APPEAL NO. 93396

On April 29, 1993, a contested case hearing was held in (city) Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The issue at the hearing was whether the appellant (claimant herein) sustained an injury to his back in the course and scope of his employment on (date of injury). The hearing officer determined that the claimant was not injured in the course and scope of his employment on or about (date of injury). The claimant disagrees with the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

At the claimant's request, he was assisted by a Texas Workers' Compensation Commission Ombudsman at the hearing. The claimant testified that he injured his back while working for his employer, on (date of injury), when he pulled a bucket of water and sand from a hole around a fire hydrant in the area of Unit 24 of the refinery where the employer was working. He had been working for the employer for about one month. The claimant said he was working with a coworker at the time of his injury, but did not offer testimony or a written statement of the coworker. The claimant's foreman at the time of the alleged injury, (Mr. M), who was not working for the employer at the time of the hearing, testified that his daily report log, which was in evidence, showed that the claimant was not working at Unit 24 on (date of injury), but instead, was working all day on (date of injury) cleaning out a tank five miles away from Unit 24.

The claimant testified that he reported his back injury to Mr. M on (date of injury). Mr. M testified that the claimant did not report an injury to him on that day, but did report a back injury to him on August 25, 1992.

The claimant testified that on the day of his injury and every day thereafter that he worked, he went to the employer's first aid station and received Bufferin for his back pain from the employer's first aid person. The employer's superintendent at the refinery site, (Mr. R) testified that whenever any medication is dispensed from the first aid station a report is filled out in which the employee receiving the medication must indicate whether the medication is for a work-related injury or a non-work-related injury. He said that the employer had no reports indicating that the claimant had gone to or received any medication from the first aid station. Mr. R also testified that the claimant did not report his injury to the employer until he, Mr. R, informed the claimant on August 25th that he was going to be terminated for unexcused absences from work. The claimant would simply not show up for work and would not call in to the employer when he was absent. The claimant acknowledged that he had a poor work record.

The claimant testified that several years before working for the employer he had

sustained a work-related back injury for which he was off work and received workers' compensation benefits, that he had also been involved in an automobile accident in which he sustained shoulder and back injuries, and that he had been off work for about three years before going to work for the employer. However, on his application for employment and a medical history report he gave to the employer with the application, the claimant reported that he had never been injured on a job for which he was off work, that he had never received workers' compensation benefits, that he had not had prior back pain or shoulder problems, and that he had been working for another employer during the three years prior to working for the present employer.

(Dr. J), examined the claimant on August 26, 1992, diagnosed a lumbar strain, and returned the claimant to full duty work with no restrictions. On September 16, 1992, Dr. J said the claimant could work with certain specified restrictions. (Dr. K) examined the claimant on September 23, 1992, diagnosed a cervical strain and a lumbosacral strain, and took the claimant off work. The claimant has continued treatment with Dr. K. The medical reports recite that the claimant told Drs. J and K that he was injured pulling or lifting a bucket at work on (date of injury).

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). The burden is on the claimant to show that the injury occurred in the course and scope of his employment. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App. - Dallas 1983, no writ). The question of whether an injury was sustained in the course and scope of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App. - El Paso 1981, no writ). Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Articles 8308-6.34(e) and (g). As an interested witness, the claimant's testimony did no more than raise a fact issue to be decided by the hearing officer. Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. The hearing officer, as the trier of fact, is privileged to believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.). When presented with conflicting evidence, as in this case, the hearing officer may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The hearing officer may accept some parts of a witness' testimony and reject other parts where the testimony is inconsistent, contradicted, contrary to established physical facts, or the manner and demeanor of the witness creates doubt of its truthfulness. Aetna Insurance Company v. English, 204 S.W.2d 805 (Tex. Civ. App. - Fort Worth 1947, no writ). In the instant case, evidence was presented which called into question the credibility of the claimant and the hearing officer choose not to believe the claimant. The recitation of the history of the injury in the medical records as reported to the

doctors by the claimant does not compel a finding that the injury occurred as claimed. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App. - Texarkana 1977, no writ). The weight to be given to the medical evidence was for the hearing officer's determination. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App. - Houston [14th Dist.] 1984, no writ). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's decision that the claimant was not injured in the course and scope of his employment on (date of injury), and that the decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App. - Waco 1980, no writ); Montes v. Texas Employers Insurance Association, 779 S.W.2d 485 (Tex. App. - El Paso 1989, writ denied).

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge